TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 61

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED APRIL 12, 1926

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 357

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLANT,

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APPEAL FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 21, 1925

[fol. 1] **IN COURT OF CLAIMS OF THE UNITED STATES**

No. 33824

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On July 23, 1917, the plaintiff filed its original petition.

On September 22, 1917, a general traverse was entered under Rule 34.

On May 1, 1922, the plaintiff, by leave of court filed its amended and supplemental petition.

Said amended and supplemental petition is as follows:

II. AMENDED AND SUPPLEMENTAL PETITION—Filed May 1, 1922

Petitioner files this, its amended and supplemental petition, and says:

I

Petitioner is a corporation incorporated under the laws of the State of Kentucky and owns and operates a system of railroads in the States of Kentucky, Indiana, Mississippi, and Louisiana, Illinois, Virginia, Tennessee, Georgia, Alabama, and Florida. Two of petitioner's lines of railroad, extending from Decatur, in the State of Alabama to Pensacola in the State of Florida and from Pensacola to River Junction, also in the State of Florida, were built with the aid of land granted to divers predecessors in title to petitioner by acts of Congress approved May 17, 1856, June 8, 1872; June 16, 1874; March 3, 1879 (11 Stats. L. pp. 15, 17, 300; 16 Stats. L., pp. 45 and 580; 17 Stats. L., p. 340; 16 Stats. L. pp. 74 and 453; 21 Stats. L., p. 390). None of petitioner's other lines was aided by any grant of lands of the United States.

Petitioner has always been loyal to the Government of the United States and never aided or abetted rebellion or insurrection against the same.

II

Between the 10th day of August in the year 1911, and the 31st [fol. 2] day of December in the year 1916, petitioner, at the request of the proper officers and agents of the United States, transported on and over its said lines of railroad many officers and enlisted men of the United States Army and Navy; the details of such transportation being set out on bills of particulars heretofore furnished and on which reports of the proper executive departments of the United States government have been made and are on file in this case.

III

The rates ordinarily applicable to such movements made by commercial tariffs, duly filed with the Interstate Commerce Commission and published as required by law. There also were in effect at said times, approved by the Interstate Commerce Commission and duly published, and applying in those regions wherein said movements occurred, tariffs fixing for private passengers of certain named classes, traveling in parties of ten or more, special reduced rates to be paid in cash at the time of issuance of tickets for the travel and not to be subject to land-grant or other deductions. With respect to said movements, in numbers of ten passengers or more, petitioner's officers often agreed that such party rates should apply without diminution for land-grant. Such party rates in those cases were as low as or lower than any that could be made by proper land-grant deductions from the rates of the ordinary tariffs. The purposes, manner and carrier's expenses in transporting said United States troops were radically different from those of said private-party transportation.

IV

Some of said movements were from Vandiver Park, which was an army camp near to Montgomery, Alabama, a junction point on [fol. 3] one of petitioner's said lines. There was in effect at that time a tariff applicable to traffic for account of the United States which fixed, in addition to passenger fares, a charge of five dollars ($5.00) per car for switching between said Vandiver Park and Montgomery (Western Railway of Alabama Switching Tariff No. 362, Supplement No. 1). In said movements from Vandiver Park a total of twenty-four cars were switched from that point to Montgomery.

V

Others of said movements were to Camp Shelby, in Mississippi, or Camp Sheridan, in Alabama, which also were army camps. For and in each of said movements there was required by the proper United States officer, and was furnished by petitioner and used, a special train. Said movements occurred in September and October, 1917. There was in effect at that time, applicable solely to traffic for account of the United States in those sections, a tariff which fixed (a) between Hattiesburg, in Mississippi, and Camp Shelby charges of ten dollars ($10.00) for each passenger car and five dollars ($5.00) for each baggage car; and (b) between Montgomery and Camp Sheridan, charges of five dollars ($5.00) for each passenger car and three dollars ($3.00) for each baggage car, besides special, low rates of individual fares to or from Hattiesburg and Montgomery; those respectively being the junction points, on railroad main lines, for said camps. Said tariff fixed also a charge of fifty dollars ($50.00) for a special train (Table A of C. D. Wayne, Acting Agent of Southeastern Tariff Association, effected July 1, 1917). In said movements a total of eleven (11) special trains were used and other cars

were used to the total amount, at said rates, of one hundred and eighty-nine dollars ($189.00).

[fol. 4] VI

In petitioner's bills rendered to the proper officers of the United States for said transportation there were claimed either said full party rates or the full rates of the ordinary tariffs, besides said special charges for switching or for special trains or individual cars to or from said camps; but, notwithstanding the provisions of said tariffs, said officers of the United States allowed and paid to petitioner for each movement the rate of said private-party tariffs less a deduction for land-grant at the same proportion that was due out of the full tariff rate; and they disallowed and withheld entirely said amounts claimed with respect to such switching or to said special trains and individual cars. Petitioner, in accepting payment upon such settlements, protested against such disallowances.

VII

The aggregate amounts so unlawfully deducted from the accounts of petitioner for the transportation so furnished are twenty-four thousand seven hundred and fifty dollars ($24,750.00), deduction in rates; one hundred and twenty dollars ($120.00), switching charges, and seven hundred and thirty-nine dollars ($739.00), charges for special trains or cars.

Petitioner prays judgment against the United States in the sum of twenty-five thousand six hundred and nine dollars ($25,609.00), the same being wholly unpaid and petitioner's right thereto not having been assigned either wholly or in part.

The Louisville and Nashville Railroad Company, by Benjamin Carter, Its Attorney-in-fact.

[fol. 5] Sworn to by Benj. Carter. Jurat omitted in printing.

[fol. 6] III. General Traverse

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered under Rule 34.

IV. Submission of Case

On February 11, 1924, this case was submitted on merits by Mr. Benjamin Carter, for the plaintiff, and by Mr. Lisle A. Smith, for the defendant, without argument.

V. History of Proceedings

On April 28, 1924, the court filed findings of fact and conclusion of law and entered judgment for plaintiff in the sum of $120.00, with an opinion by Campbell, Ch. J.

On June 27, 1924, the plaintiff filed a motion to amend the findings of fact.

On October 20, 1924, the court entered an order filing amended findings of fact, and the findings as thus amended were adopted as the findings of the court, the judgment with opinion heretofore rendered to stand.

Said findings of fact, as amended, conclusion of law and opinion of the court are as follows:

[fol. 7] **VI. Findings of Fact, as Amended, Conclusion of Law, and Opinion of the Court by Campbell, Ch. J.**—Entered Oct. 20, 1924

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Amended Findings of Fact

I

The plaintiff is a corporation duly incorporated under the laws of the State of Kentucky, and during the times of the different transactions hereinafter described in these findings of fact owned and operated and still owns and operates a system of railroads in said State and the States of Indiana, Illinois, Virginia, Tennessee, Georgia, Alabama, Mississippi, and Florida. Two of plaintiff's lines, one extending from Decatur, Alabama, to Pensacola, Florida, and the other from Pensacola to River Junction, Florida, were built with the aid of public land granted by Congress to the predecessor in title of the plaintiff company.

II

From August 10, 1911, to April 4, 1917, dates inclusive, large numbers of officers and enlisted men of the United States Army and Navy were transported by plaintiff over its lines on Government transportation requests issued by proper authority. In some instances a single passenger would be transported on a transportation request, sometimes more than one but less than ten would be transported on one transportation request, and sometimes ten or a greater number would be transported on one transportation request.

III

There were individual passenger rates for the public in force on plaintiff's lines at the time the transportation in question was furnished, fixed tariffs being duly filed with the Interstate Commerce

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Commission, as required by law. There was in addition to such [fol. 8] individual tariff rates, certain party rates open to the public in force on plaintiff's lines at that time by which ten or more passengers, travelling by scheduled trains, were entitled to reduced rates. Some of these party rate tariffs provided that cash should be paid at the time the tickets were issued and that there should be no land-grant deductions made from such party rates. Others provided neither for cash at the time the tickets were furnished nor against land-grant deductions from such party rates.

IV

The plaintiff as the initial carrier presented its bills to the proper disbur-ing officers on forms prescribed by the Comptroller of the Treasury, and obtained by requisition on the Public Printer who was required to print and distribute such voucher forms. Where ten or more persons were transported in a troop movement, the plaintiff billed them at individual rates less proper land grant deductions where the rates thus obtained were the lowest rates; where such net rates were equal to or higher than party rates in force, party rates without land grant deductions were used by plaintiff in its bills. When plaintiff's bills came before the accounting officers for settlement land grant deductions were made from party rates, and where individual rates with land grant deductions were made, party rates with land grant deductions were applied by said accounting officers. The plaintiff filed protests against the deductions from every one of plaintiff's bills except Bill No. 2402. There were two forms of vouchers prescribed as aforesaid, procurable from the Public Printer, (1) one for use where no land-grant was involved, with columns each for class, number of passengers, rate, and amount, and (2) one where land-grant was involved with columns each for total mileage, land-grant mileage, class, number of passengers, rate, gross amount, amount to be deducted account of land-grant, and amount claimed. On both forms was the following certificate: "I certify that the above account is correct and just; that the services have been rendered as stated; that payment therefor has not been received; and that the rates charged are not in excess of the lowest net rates available for the Government, based on tariffs effective the date of service." Where plaintiff made no land-grant deductions it made out its bills on the first form described above; where it made land-grant deductions it made out its bills on the second form described above.

V

The land grant deductions made from plaintiff's bills under party tariffs in force providing for payment of cash at the time the tickets were furnished and against land grant deductions, amounted in the aggregate to $23,399.26. The land grant deductions made from plaintiff's bills under party tariffs in force, making no provision for payment of cash at the time the tickets were furnished, nor against deductions for land grant, amounted to $141.44.

VI

The total land grant deductions made from the different items of bill No. 2402 by the accounting officers amounted to $1,789.36, and this amount is embraced in the sum of $23,399.26, set out in Finding V. There were no protests made by plaintiff against the deductions from different items of said bill No. 2402.

VII

There was in force on plaintiff's lines during the time of the different troop movements mentioned above, a tariff described as the "Western Railway of Alabama Switching Tariff, No. 362," and "Supplement No. 1" thereto, which fixed a switching charge of $5 per car between Vandiver Park (Camp Sheridan), an Army camp, and Montgomery, Alabama. During the troop movements described above, twenty-four cars of plaintiff loaded with troops were switched [fol. 9] between said camp and Montgomery. The tickets issued to said troops started from or ended at the station in Montgomery, and the travel between Montgomery and Vandiver Park, four miles distant, if switching charges are not allowed, would be performed without compensation. The total switching charges amount to $120.

VIII

Bill No. 2675 was rendered to the Army disbursing officer for the transportation of 1,988 United States troops on September 15 and 26, 1917, as special service charges between Hattiesburg and Camp Shelby, Mississippi, in addition to their per capita fares, for one standard sleeper, $10; three 16-section tourist cars, $30; forty-six coaches, $460; five standard Pullmans, $50; fifteen baggage cars, $75; aggregating $625. Bill No. P-2685 was rendered to said disbursing officer for the transportation of 134 passengers on September 28, 1917, as the min-mum special train service charge between Hattiesburg and Camp Shelby, Mississippi, in addition to the per capita fares, for three coaches and one baggage car, $50, aggregating for the two bills $675. There is nothing in the evidence to show that special or expedited train service between Hattiesburg and Camp Shelby was requested by the Government.

The tariff in force when said troops were transported was as follows:

Table A—Effective July 1, 1917—Hattiesburg, Miss. (Camp Shelby)

Basis for Making Through Fares

In constructing through fares and distances to Camp Shelby, Miss., add the following amounts and distances published to Hattiesburg, Miss.:

One-way individual, 32¢.

One-way per capita party (10 or more on one ticket), 32¢.

Distance from Hattiesburg, Miss., to Government camp station, 10.5 miles.

Division Requirements

On traffic received from or delivered to connecting lines at Hattiesburg, Miss., the Mississippi Central Railroad and Gulf & Ship Island R. R. will require the following specifics between Hattiesburg and Camp Shelby in each direction:

For individuals, 32¢ per capita.

For parties (10 or more on one ticket), 32¢ per capita.

For each passenger coach, dining or sleeping car, in service, $10.

For each baggage car in service, $5.

Special train service is necessary in all cases; minimum charges $50 from Hattiesburg, Miss., to Camp Shelby, Miss.

IX

Bills Nos. P-2701 and 2703 were rendered to the said disbursing officer for the transportation of 460 United States troops, on October [fol. 10] 9 and 12, 1917, as special service charges between Montgomery and Camp Sheridan, Alabama, in addition to their per capita fares, for nine tourist sleepers, $45.00, three baggage cars, $9.00, and two coaches, $10.00, a total for the two bills of $64.00. There is nothing in the evidence to show that special or expedited train service between Montgomery and Camp Sheridan was requested by the Government.

The tariff in force when said troops were transported was as follows:

Table A—Effective July 1, 1917—Vandiver Park, Ala. (Camp Sheridan)

Basis for Making Through Fares

Eastbound.—In constructing through fares and distances to Vandiver Park, Ala., add the following amounts and distances to fares and distances published to Montgomery, Ala., not to exceed fares and distances published to Opelika, Ala.:

One-way individual, 10¢.

One-way per capita party (10 or more on one ticket), 10¢.

Westbound.—In constructing through fares and distances to Vandiver Park, Ala., use fares and distances published to Montgomery, Ala.

Division Requirements

On traffic received from or delivered to connecting lines at Montgomery, Ala., the Western Ry. of Ala., will require the following specifics between Montgomery, Ala., and Vandiver Park, Ala., in each direction.

For individuals, 10¢ per capita.

For parties (10 or more on one ticket) 10¢ per capita.

For each pas-enger coach, dining, parlor, or sleeping car, in service, $5 the fare in each car to apply on minimum.

Where special train service is necessary, minimum of $50.00 will be required in each direction, whether one car or more.

For each baggage car, in service, $3.00.

Conclusion of Law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $120. It is therefore adjusted and ordered that the plaintiff recover of and from the United States the sum of one hundred and twenty dollars ($120).

Opinion

Campbell, Chief Justice, delivered the opinion of the court:

The plaintiff bases its claim for the refund of land-grant deductions upon the requirements in certain party rate tariffs of cash at the time tickets are furnished with no land-grant deductions from the rates fixed in such tariffs. Its contention is that the requirement of cash payments excludes any idea of land-grant deductions from charges at party rates. But this contention can not be upheld. Nor [fol. 11] can the Government be excluded from taking the tariff rates less land-grant deductions. The plaintiff, when the transportation was furnished, did not stand upon the cash requirement, but, as initial carrier, issued the necessary tickets and sent in its bills for the transportation to the disbursing officer on a credit basis. The Government from the very nature of things can not be required to deal with the railroads on a cash basis for transportation. The ticket agents are unable to figure out land-grant deductions, and it would take time and delay to have the rates figured out by experts. The law contemplates that payments by the Government shall be made only after the bills have received the approval of certain designated officials. The bills must go through a regular routine inspection. This court held in Louisville & Nashville Railroad Co. v. United States, 58 Ct. Cls. 622, that failure of the Government to pay cash for tickets, as required by certain tariffs in force, did not relieve the company from land-grant deductions. See also Illinois Central R. R. Co. v. United States, 58 C. Cls. 182.

As to the items growing out of so much of the transportation as was between Montgomery and Camp Sheridan and between Hattiesburg and Camp Shelby, we can not agree with the contention that there was any special or expedited service contracted for on the one hand, or an additional special service provided for in the tariffs on the other hand. The tariffs provided for a through rate to Montgomery or to Hattiesburg as the case may be, and also provided that in constructing through rates to the camps in question certain amounts and distances should be added to the published rates to Montgomery or Hattiesburg. The amount to be added for individual fare is settled and the amount for per capita party of ten or more on

one ticket is stated. These rates are stated for the benefit of the connecting lines as well as for the public. When constructed on the prescribed basis, the rates would be those at which the individual or party would be entitled to transportation to the point of destination, one of the camps. The accounting officers have proceeded in such cases upon the view that the reference to "special train service" under the heading in the tariff of "Division requirements" is a matter between the carriers themselves and provides for the absorption by the terminal carrier of the minimum requirement on account of the special train service, when the revenues exceeded the minimum requirement, and the taking care of this minimum requirement by other carriers where the revenue is not equal to or in excess of this minimum. It seems to us the view of the accounting officers is the more reasonable one. Certainly the rate provided for an individual or for a party of ten or more individuals would apply to the individual or party, and these would not have to pay more because of the stated "special train service." Nor does the Government have to pay more than these party rates. There was no special or expedited service contracted for.

As to the switching charge from Montgomery to Camp Sheridan, the tickets on which the troops moved called for and ended at Montgomery. The plaintiff is entitled to be paid for the additional transportation from Montgomery to the camp.

Hay, Judge; Downey, Judge; and Booth, Judge, concur.

[fol. 12] VII. JUDGMENT

At a Court of Claims held in the City of Washington on the 20th day of October, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the plaintiff, and do order and adjudge, that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of One Hundred and twenty dollars ($120.00).

By the Court.

VIII. PETITION FOR APPEAL—Filed January 14, 1925

Claimant shows to the court that this case involves more than twenty-five thousand dollars ($25,000.00); that on the 28th day of April, 1924, the court rendered a judgment in claimant's favor for one hundred and twenty dollars ($120.00) and filed findings of fact; that claimant filed a motion for an amendment of said findings and on the 20th day of October, 1924, the court entered an

order making said amendment. Claimant hereby applies for an appeal to the United States Supreme Court from said judgment.

Benjamin Carter, Attorney for Claimant.

IX. Order Allowing Appeal

It is ordered by the Court this 19th day of January, 1925, that the plaintiff's application for appeal be and the same is allowed.

[fol. 13] In Court of Claims

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the submission of case; of the findings of fact, conclusion of law and opinion of the court by Campbell, Ch. J.; of the judgment of the court; of the plaintiff's application for an appeal to the Supreme Court of the United States; of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 23rd. day of January, A. D., 1925.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of the Court of Claims.)

Endorsed on cover: File No. 31,029. Court of Claims. Term No. 357. The Louisville & Nashville Railroad Company, appellant, vs. The United States. Filed April 13, 1925. File No. 31,029.

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Supreme Court of the United States.

October Term, 1926.

No. 61.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,

Appellant,

v.

THE UNITED STATES.

BRIEF FOR APPELLANT

BENJAMIN CARTER,
Attorney for Appellant.

Index of Subjects.

Special tariffs of rates established for the transportation of private passengers, paying their own way, are not applicable to passengers traveling on Government account.

Special tariffs of rates established for the transportation of private passengers paying their own way are applicable to transportation of Government account only when, and to the extent that authorized officers of the railroad companies tender them by formal contract or by bills presented after the services

Special tariffs of rates established for the transportation of private passengers paying their own way, which, by express terms or by necessary implication, provide for cash payment in advance, as a condition to such rates, are not applicable to passengers traveling on Government account.

A bill rendered by a railroad company for passenger services, stating only the fare per capita, and computing the compensation at that rate, cannot be construed a gross rate, subject to deductions.

The granting of credit to the Government for transportation in cases where advance payment is exacted of the carriers, although it may be lawful, is such an essential difference of service that the carriers may not be compelled to accept from the Government the rates to which private passengers are entitled

An individual passenger rate established for a specified number of passengers cannot be applied in any less number of passengers.

Transportation requests, on which transportation of passengers is furnished by railroad companies to the Government, are not cash nor the legal equivalent thereof.

A station agent of a railroad has no power to concede and establish for the transportation of passengers any fares or conditions other than those fixed by the companies and regulations of the company and the laws.

A railroad ticket furnished by the station agent of the railroad company under a Government transportation request does not give any validity to the rate or condition of which the company avails thereunder

A station agent, unless by authority from his superior officer, cannot waive a condition attaching by a tariff to fare named.

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Supreme Court of the United States.

October Term, 1926.

No. 61.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,

Appellant,

v.

THE UNITED STATES.

BRIEF FOR APPELLANT

This is a novel case, being concerned with passenger fares for parties of ten or more persons, established by various railroad tariffs, and the liability of the same to land-grant deductions when tendered by the carriers, without such deductions, to the Government. These tariffs fixed rates for private parties on the flat basis of two cents per mile per capita.

In some instances a single passenger, sometimes more than one, but less than ten, and sometimes ten or a greater number were transported on one transportation request.

Some of the party rate tariffs provided that cash should be paid at the time the tickets were issued

and that there should be no land-grant deductions made from such party rates. Others provided neither for cash at the time the tickets were furnished nor against land-grant deductions from such party rates.

In the transactions sued-on claimant's Auditor of Receipts, using the form of bill prescribed by the War Department for flat claims, not subject to deductions, applied the identical rates of these party tariffs; but the disbursing and accounting officers of the Government made the same proportionate deductions as if the bills had been made at the full rates of the commercial tariffs.

Against the reductions of compensation so made, except some items of one bill, viz., 2402, claimant, when accepting payment, protested against the reductions.

The distinguishing feature in the instant case is the combination of land-grant reductions with those which were involved in the construction of the net party rates. The argument is that, under the previous adjudications, the party rates were not valid as applied to the Government, but that they became valid when an additional reduction was made on the score of land-grant.

The Government's contention is that it is a discrimination against the Government—notwithstanding the difference between Government traffic and private traffic, as regards methods of the same and accounting therefor—not to charge the same rates for both, and so, therefore, that any special rates established for traffic over land-aided track at those rates, just as those made at full tariff rates, is subject to reductions. Appellant's argument,

amply supported by decisions of the Federal courts, treating especially of the "cash" question, is that the differences between the two classes of traffic are sufficient to make the party tariffs inapplicable to any Government traffic.

There also were in force at the same time on appellant's lines special tariffs for the switching of cars between the terminal points on these lines proper and near-by camps reached by short lines.

ASSIGNMENT OF ERRORS

Appellant assigns as error action of the court as below:

(1) In approving passenger rates constructed by making deductions from rates offered by the carrier as net rates, not subject to any deductions.

(2) In approving, as bases for rate-making, rates offered by the carrier as net rates.

(3) In applying to transportation for Government account tariffs of special rates which by their terms were restricted to private transportation.

(4) In applying to transportation for which cash was not paid in advance tariffs of special rates which stipulated for such advance payment as a condition.

(5) In taking, as bases for Government transportation, from which to make land-grant deductions, tariffs of rates which were not applicable to private transportation in the actual conditions of the transportation performed.

(6) In disallowing arbitraries or special rates for transportation to and from Government camps in

addition to the charges to or from points on the main lines through which the traffic passed.

(7) In disallowing special charges for switching of cars between Government camps and points on the main lines through which traffic passed.

AUTHORITIES AND ARGUMENT

The chief issues in this case are (1) the right of the Government, in transporting troops, to avail generally of party rates, which, by their express terms or by necessary inference, were restricted to passengers traveling on private account; (2) the condition laid down to the Government, as to private passengers, in tariffs governing some of the movements in question, that cash be paid in advance, and (3) the right of the Government, when the option was offered to it, of paying (a) net party rates, or (b) ordinarily tariff rates with land-grant reductions, of combining the two privileges by making land-grant reductions from the amounts accruing and claimed by the net rates.

The rights and immunities involved on the Government's party are those of a contractor, not a sovereign; and these questions are subject to the same tests as though private individuals, instead of the Government, were concerned.

Every grant of public lands to and acceptance of the same by a railroad company is a contract. So this court has declared time and time again.

The earliest of these private party tariffs was put into effect on January 1, 1901. It provided that tickets for theatrical or sporting parties or the like, in lots of ten to nineteen, would be sold at two and

one-half cents per mile, and the first modification was made in April, 1901. For thirty years before that time the practice had been to allow transportation to the Government, under the ordinary tariffs, without cash payment. The railroads did not charge it any greater compensation than was paid by private passengers, except as was due to the latter by issuing party tickets, nor did it charge any more for soldiers, less than ten in number, than for the general public. About 1899 the Government for the first time made claim that for ten or more soldiers it was entitled to the party rates. Resistance was made by the railroad companies as soon as feasible in the circumstances, and in February, 1905, two judgments were recovered at the Court of Claims, in cases of the Chicago & Northwestern Railway Company and the Chicago, Rock Island & Pacific Railway Company. A number of other cases followed, all with the like result. Inevitably a large part of the time between 1901 and 1910 was consumed in discussion of this new claim set up by the Government. So for some thirty years the Government accepted service from the railroad companies at the ordinary rates, with reductions for land-grant only; and for, say, four years afterward, the same service was accepted on the same scheme of rates, but with the admonition that the railroad companies would fight for any amounts withheld.

It had been supposed since 1904 that the exacting of cash from one customer and the granting of credit to another, while just in some conditions, was a discrimination. The Circuit Court of Appeals for the Seventh Circuit, in deciding the case of the

Chicago & Northwestern Railroad Company, 127 Fed. 785, in that year, said:

The Government of the United States in buying transportation for its soldiers in lots of ten or more is not entitled to the benefit of a reduced ten party rate given by the railroad company's schedule to "theatrical, operatic or concert companies, hunting and fishing parties, glee clubs, brass or string bands, boat, baseball, polo or tennis clubs, football teams and other parties of like character." Nor does the refusal to give it the same rate constitute an unjust discrimination against it or subject it to undue prejudice or disadvantage, in violation of the Interstate Commerce Act, when it is shown that the purpose and effect of the party rate given by the schedule is to increase the company's business, and that tickets sold thereunder are closely limited in time and are paid for in cash in advance, while those furnished to the Government are not so limited, are furnished on a requisition and are only paid for after delay in the auditing and allowance of the claims by the War and Treasury Departments. In such case the conditions and circumstances under which the service is rendered are essentially different and justify the making of different rates.

This [giving of credit to the Government] must always constitute a material difference, so long as commodities can be sold cheaper for cash than on credit (p. 791).

The Government in the transportation of soldiers does not financially or in any other way come into competition with any of those parties who are given the party rates (p. 791).

* * * * * * *

It will often happen when such parties travel one way over a line of road their occasion will lead them to travel back the same way, so that the patronage of the road is doubled, and generally what is a

benefit to the railroad companies by way of increase of business is a benefit, also, to the public upon which they rely for support (p. 790).

* * * * * * *

The giving of the party rates stimulates other travel and that is one purpose, no doubt, of giving them, whereas the transportation of soldiers can have no such effect (p. 790).

* * * * * * *

This was a test case, so made by agreement of a number of railroad companies. Naturally, the decision has carried great weight. In United States v. Wells Fargo Express Co., this case was cited with a number of others differing, somewhat broadly in facts, for the proposition that the denying to the Government of party rates allowed to theatrical parties and others of like kinds is not a discrimination within the meaning of sections one and two of the Hepburn Act.

The case of Wight v. United States, 167 United States 512, decided in 1897, was concerned with rebates allowed to one railroad company because it had no side connection. This practice was held to be obnoxious to the "discrimination" clauses of the Interstate Commerce Act, the transportation as a whole *being* "under substantially similar circumstances and conditions."

Interpreting the Wight case in Delaware L. & M. R. Co. v. I. C. C., 166 Fed. 489 (510), in connection with the Chicago & Northwestern case, the court said that whether all of the reasons assigned by the court in the Chicago & Northwestern case, in view of the decision of the Wight case, had been considered and seriously questioned by the Commission; but

"the factor remains that Judges Grosscup, Baker, and Bunn did consider the facts stated seven years before (1908) as constituting dissimilarity." The reasonable inference, the court says, is that the reasons stated came within the term "matter of carriage," as used in the Wight case as being one of the conditions precedent or subsequent, as distinguished from the question of competition.

In 1914 the United States Court of Appeals for the Sixth Circuit, in the case of the Hocking Valley Railway Co. v. United States, 210 Fed. Rep. 735, interpreted the provisions of the Interstate Commerce Acts relative to a carrier's "failure to observe tariffs." This was a criminal proceeding, and therefore any substantial doubt as to the meaning of the statute was to be resolved in the carrier's favor. The matter concerned was the acceptance by the carrier from one shipper of promissory, negotiable notes, payable four months after shipments, with 5 per cent interest. The court held that these instruments were not cash or the equivalent thereof; that the acceptance of the same was a discrimination against shippers who paid cash, and therefore a failure to observe the tariffs.

On application to the United States Supreme Court, a writ of certiorari for review of this decision was denied (234 U. S. 757). The case has been cited now and then in subsequent decisions, but without modification in the particular here stated.

The "Settled Practice" Is Adverse to the Government.

The phrase "settled practice" has been wrongly

used in reference to the use of the private party rates by the Government. For about forty years it paid, not those net rates, but the full tariff rates, with proper reductions for land grants. During the twenty-five years following there has been a continuous contest outside or in the Court of Claims, during which years all cases, except one decided in 1923 and the instant case, were decided adversely to the Government.

There never has been a settled practice of paying for Government transportation at the rates of the private party tariffs.

The following Court of Claims cases, all decided in favor of the carrier, were decided in the years 1904 to 1910:

Chicago & Northwestern Ry. Co., 40 Ct. Cls., 536;
Chicago, Rock Island & Pacific Ry. Co., Ct. Cls., 536, ib. same page;
Chicago & Alton R. R. Company, 41 Ct. Cls., 513;
Missouri Pacific Ry. Co., 44 Ct. Cls., 603;
Chicago, Burlington & Quincy, 45 Ct. Cls., ~~519~~ 670;
Denver & Rio Grande R. R. Co., 46 Ct. Cls., 690.

The Government Had Its Option to Pay the Full Party Rates or Land-grant Rates.

When the instant case came to bar it seemed to be settled beyond dispute in the Court of Claims that when the Government makes a special contract with a carrier for a special service, it must pay the rates fixed for that service instead of those established

by the ordinary tariffs for the ordinary service (Cases of Baltimore & Ohio R. R. Co., 56 Ct. Cls., 384; Los Angeles & Salt Lake R. R. Co., 55 Ct. Cls., 305; Yazoo & Mississippi Valley R. R. Co., 54 Ct. Cls., 165; Southern Pacific Co., 53 Ct. Cls., 332; Bush, Receiver, 52 Ct. Cls., 199).

In the Baltimore & Ohio case the court said:

"It must be admitted in this case that the railroad company would not have been required under regular tariff to furnish the service it did furnish. Nothing stood in the way of the defendant, if it so desired, to avail itself of the customary mode of transportation furnished to the general public under the regular tariff rates, duly published. The execution of a written contract for the service, if it rises to no greater dignity than an ordinary shipment, was a meaningless performance."

That the difference in the present case relates to the price, instead of the manner of the service, does not seem to be material. The subject of those cases, of course, was options exercised at the times when the service was performed or when the Government's officers obtained the facilities therefor. In the present case the Government had an option, after the service was performed, to avail either of the ordinary tariff rates, with proper land-grant deductions, or of the special party rates, which were not subject to deductions on any account whatever. This option was created by claimant's tender, in its bills rendered, of the party rates. "Nothing stood in the way of defendant, if it so desired, to avail of the customary" scheme of rates applicable to Government transportation; and, after the special ten-

der, by claimant's bills of the party rates, it, the Government, had an equal right to avail of those. It could *not* make land-grant deductions from the party rates; for then it would not apply either the exact rates tendered or those to which it was entitled by the tariffs and land grants.

The party-rate tariffs were not open by their terms to the Government or anyone else who did not pay cash in advance of transportation; and it is indeed analomous if, by escaping cash payment, the Government may get the right to pay something less than the rates of those tariffs.

The Carrier Waived Nothing Except Its Right to Ordinary Government Rates.

Sometimes the courts have said that a special con- had been waived by some action of railroad officers. If there was any waiver in this case, it was made by claimant's Auditor of Receipts, who compiled and presented bills to the Government's disbursing or accounting officers. He, in effect, said "Although you did not pay in advance for the transportation, the company will accept from you the same fares that were prescribed by the tariffs carrying this cash provision." Surely this is all he said. He did not say: "You may apply these identical, reduced rates (assuming that they are lower than land-grant rates) and then make land-grant deductions therefrom." Use of a flat-rate bill-form shows that he was not consenting to land-grant abatements from the party rates. Significance is given to this fact by the opinion of the Court of Claims in the South-

ern Pacific Co.'s case, 59 Ct. Cls. 36, decided on January 7, 1924. There it is said:

"All of plaintiff's bills for transportation here involved were stated upon the regular approved form of voucher for such transportation of passengers as was subject to land-grant deduction, and by 'approved' form is meant a form prescribed by the Comptroller of the Treasury with the approval of the Secretary of the Treasury under authority of the Dockery Act. See 28 Stat. 206, sec. 5. This form required the stating of the claims in separate columns under the following headings: 'Date,' 'No. of transportation request', 'From', 'To', 'Total distance', 'Miles of land-grant road', 'No. of men', 'Rate per man', 'Gross amount', 'Amount to be deducted on account of land grant', and 'Amount claimed'. * * *

The use of this and other forms relating to Government transportation was specifically prescribed by Department Circular No. 62, dated October 29, 1907, issued by the Comptroller of the Treasury with the approval of the Secretary. (14 Comp. Dec. 967.) * * *

At the same time that this voucher form for transportation of passengers subject to land-grant deduction was prescribed appropriate forms were also prescribed for vouchering transportation not subject to land grant. From them the columns headed 'Miles of land-grant road', 'Gross amount', and 'Amount to be deducted on account of land grant' were omitted. (See circular above referred to and Form No. 8 on page 980, same volume.) These and other prescribed voucher forms were available to the railroad companies in such quantities as they might desire, and it was therefore the option of a railroad company, in the first instance, to state its claim on such form as it might deem appropriate thereto."

Nothing occurred from which a waiver by any other representative of appellant could be argued There was no question presented to the station agent for decision, and therefore no rights of the company which he could concede to the Government. Transportation requests were presented to these agents in which nothing was said or suggested in regard to the fares payable. He issued a ticket for each passenger or a group ticket for all, according to specifications in the requests or to his own convenience. He could not refuse to issue the tickets. But neither could he make any special agreement fixing the fares to be paid. If these agents had been called on to make, and had made, express concessions affecting the rates, these would have had no validity, for they would not have been within the actual or implied authority of those functionaries.

An agent of a carrier, unless under general or special authority, actual or presumptive, given by its proper officer, or by custom of the business involved, has no power to contract with a passenger or shipper for a special rate or special services or facilities; and in the absence of proof the agent will not be presumed to have any authority not conferred in the one way or the other.

Chicago & Northwestern Railway Co. v. United States, *sup.*

Chicago, Rock Island & Pacific Railway Co. v. United States, *sup.*

Chicago & Alton Railroad Co. v. United States, *sup.*

Missouri Pacific Railway Co. v. United States, *sup.*

Chicago, Burlington & Quincy Railroad Co. v. United States, *sup.*

Thurman v. Wells, 18 Barb. 500, 515, 516, 518, 519.

Evans v. Atlanta & West Point Ry. Co., 56 Ga. 498.

Missouri Pacific Ry. Co. v. Stults, 31 Kansas 752.

The carriers' counsel in the Chicago & Northwestern and "Burlington" cases argued that:

"A station agent has no more authority to concede a rate unduly low than an officer of the Government had to pay, or promise to pay, a rate unduly high.

The court held this to be a sound proposition.

Other points decided in those cases were that the rights of the parties were not affected by the agents' compliance with another provision of the special tariffs, viz., the issue of a single ticket, nor by notations on the transportation requests of "Party rates" or "Lowest available rate."

It is true that the Interstate Commerce Acts give the Government certain advantages over private shippers. It is not required that special tariffs, relative to Government transportation, be filed with the Commission; and authority is given for special contracts affording the Government lower rates than those paid by private shippers or passengers, or for other special advantages. This, of course, means that an agreement of an officer of the Louisville & Nashville Railroad Company, having authority in the premises, and a like agent of the Government for any special rate or any special condition for the transportation, say, of soldiers or of property of the Government, is valid. It does *not* mean that a mere

station agent, or other representative of the railroad company with limited authority, can bind it by a like agreement with an officer of the Government.

Of course the argument for a waiver of payment in advance assumes that the station agents had the right, otherwise, to exact such payment. There is never a legal waiver of anything to which a lawful claim could not have been asserted.

If "the very nature of things" renders it impossible for the Government to pay cash for transportation, there has been, in the cases cited herein and others, an enormous waste of printers' ink. Were it unthinkable that the Government pay cash when it obtains transportation, why all this pother of judges and lawyers over the law? There is no reason why a Government officer, in charge of transportation to moderate amounts, like quartermasters buying limited amounts of provisions or horse feed, should not carry sufficient supplies of money. Quartermasters do that identical thing. In the Government offices in Washington, millions of currency are disbursed twice a month to the civil list for salaries just then due. Probably nobody ever supposed that the clerks stood in line while the money to pay them was printed or stamped.

Why may not sufficient supplies of currency be supplied to transportation quartermasters before they go to the railroad offices to do business? The Postoffice Department has found a way of paying for mail transportation as soon as the month's services has been footed up and without waiting for any other auditing or adjustments. Revisions are then made at such length of time as may be necessary and the amounts of the over-payments are recap-

tured by the postal authorities out of the next month's vouchers.

Script, payable forthwith to the carrier, signed by the quartermaster and countersigned or receipted by the railroad agent, would be a sort of cash; and to compute the approximate price of the tickets to be written into the script—subject to correction in the auditing offices—would not impose an unreasonable burden on the quartermasters. Doubtlessly, in ninety-nine cases out of a hundred, it would bring a final settlement quicker than the present plan does. In most cases, no doubt, the amount stated would be absolutely correct.

BENJAMIN CARTER,
Attorney for Appellant.

Office Supreme Court, U. S.
FILED
DEC 7 1926
WM. R. STANSBURY
CLERK

Supreme Court of the United States

October Term, 1926.

No. 61.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Appellant,

v.

THE UNITED STATES.

APPENDIX TO BRIEF FOR APPELLANT.

Being Copy of Opinion of the Comptroller of the Treasury furnished to the Secretary of War of date, May 17, 1907.

BENJAMIN CARTER,
Attorney for Appellant.

(COPY)

OFFICE OF COMPTROLLER
OF THE TREASURY.

TREASURY DEPARTMENT
WASHINGTON
May 17, 1907.

The Honorable,
The Secretary of War.

Sir:—

I am in receipt by your direction under date of April 6, 1907, of the following communication from the Acting Quartermaster General requesting a decision whether or not the party rates mentioned therein should be applied in settlement of the transportation therein, referred to, and whether party rates should inure to the benefit of the Government on future business—which communication reads:

"By authority of the Secretary of War, I have the honor to submit herewith, for decision, a claim of the Missouri, Kansas & Texas Railway Company for the transportation of 11 officers and 194 enlisted men, being the 2nd Battalion of the 26th Infantry, from San Antonio, Tex., to Fort Reno, Okla., via the M. K. & T. Ry. and the Rock Island System.

"This movement was started on short notice, and it was inpracticable to invite bids for the transportation involved. Settlement has been offered the M. K. & T. Ry. Co. on the basis of the party rate applicable between the points mentioned as shown on enclosed fare sheet #322, I.C.C. #840, of two-thirds of the first-class standard rate per capita, $9.80, or a total of $2,009.00. The carriers demand settlement on the basis of the full first-class rate, $14.65 per capita, making a total of $3,003.25.

"The declination of the railway company to accept the rate offered by the Quartermaster's Department is based, as stated by them, on a

decision of the Court of Appeals of the State of Illinois, which decision the Hon. Attorney General of the United States concurred in, and which (as you advised the Secretary of War on July 30th, 1904), was accepted as conclusive by your office.

"In view, however, of the decision of the Interstate Commerce Commission, as promulgated in Circular No. 4–A of that Commission, dated September 29th, 1906, as follows: '*All tariffs and regulations governing the issuance and use of party rate tickets, together with the rules relating to the allowance of free baggage to persons using such tickets, must be regularly filed and published; the privileges so extended must not be limited to any particular class or classes of persons, but must be open to all*'; a decision is respectfully requested whether the party rates published by the Missouri, Kansas & Texas Railway Company in fare sheet #322 (herewith) may not be applied on the settlement of the enclosed account of that company, and also whether, if a decision favorable to the government is rendered, same may not be made applicable under similar conditions to future business."

On the 16th of April last I submitted to the Interstate Commerce Commission the facts set forth in the above communication and requested an expression of their views on the facts as therein stated. The commission under date of the 8th instant, reported as follows:

"Before leaving the city a few days ago on an urgent demand for his presence in an official capacity at Denver, Colorado, the Chairman of the Commission put in my hands your communication to him of April 16th and requested me to reply to it as soon as possible.

"As the general substance of your inquiry is answered in a formal opinion by the Commission on the question of party rates, copies of which are available for distribution for the first time this morning, I now at once send a copy to you. It is perhaps the only answer that the Commission can

make to your inquiries. I ought to add however that the principles announced in our decision are applicable to any party rate transportation had since the amended law went into effect on August 28, 1906. In other words our opinion in no wise alters the law, but is simply our construction of it.

"Upon examing the opinion you will find that it discusses to some extent *United States* v. *Chicago & Northwestern Railway Company*, 127 Fed. 785, and points out that while the tariff in that case required a cash payment for a party rate ticket, the Government purchased the transportation upon requisition. The opinion of the Commission suggests that this fact may be a controlling one as a matter of law, and that the failure of the Government to pay for its transportation in cash as required by the published tariffs may afford the carrier a valid reason for denying to the government the benefit of the reduced rate. But whether that would be a reasonable regulation as against the government is manifestly a point on which we would not care to express any opinion except upon a formal complaint."

After a careful reading of the opinion reached and the letter of the Commissioner, I am unable to determine with certainty what would be its holding relative to the rights of the Government to make payment of the claim submitted on the basis of party rates, taking into consideration the language used by it in its comment on the case of *United States* v. *Chicago & Northwestern Railway Company*, 127 Fed. Rep. 785.

Whether the Commission will hold, where a single ticket is obtained on a transportation request, as I understand was the case in your submission, and where cash is not paid for such ticket but the railroad presents its account for settlement in the usual way, as in the present case—that the Government is entitled to the benefit of party rates, is to my mind involved in doubt. I have my individual opinion as to the right of the Government to demand the benefit of party rates, where a

company gives a rate confined to certain organizations and not including officers and troops of the Government, under the facts and circumstances surrounding the transportation of its officers and troops, secured as they are upon transportation requests and not paid for in cash; but if I should hold that the Government is not so entitled, the Government would be precluded from testing the question of such right in the courts.

I will therefore hold that the Government is entitled to the party rate, upon the facts in question in the case submitted, and suggest that in the future where a party rate is desired by the Government and a party rate is in force limited to certain organizations and not including Government troops, that the request call for the party rate, and if refused, report the fact of such refusal to the Interstate Commerce Commission for its appropriate action in bringing the question before the courts. If the Commission takes a case before the Courts we will then have the benefit of a binding decision; and in the meantime the Railroad companies can receive the lower, or party rate under protest, which fact will protect their claim for the difference between the party and the higher rate, if the Commission should fail to make a case, or the courts should determine adversely to the apparent view of a majority of the Commission, that party rates where given must be open to the general public, including the officers and soldiers of the Government.

The administrative decision of the Interstate Commerce Commission herein referred to can be procured on application to the Commission.

The enclosures transmitted by you are herewith returned.

Respectfully,
(Signed) R. J. TRACEWELL,
Comptroller.

(12 inclo.)
OFFICIAL SEAL Q. M. G. O.
A TRUE COPY, CHARLES C. CLARK,
Captain, Commissary, U. S. Army,
Acting Chief Quartermaster.

December 1, 1926.

Mr. Benjamin Carter,
1400 H Street, N. W.,
Washington, D. C.

Dear Sir:

The copy of decision which you left with me this afternoon and which is returned herewith has been compared with the original press copy of decision on file in this office and is found to be a true copy with certain unimportant corrections noted thereon with lead pencil. The decision is one rendered to the Secretary of War May 17, 1907, by Comptroller of the Treasury, R. J. Tracewell, bearing upon the application of party rates in the settlement of transportation claims.

Respectfully,

(Signed) LUTHER R. GINN,
Assistant Comptroller General
of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 61

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Appellant

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 8, 9) is reported in 59 Ct. Cls. 886.

JURISDICTION

The judgment to be reviewed was entered on amended findings of fact on October 20, 1924 (R. 9), and a petition for appeal was duly filed on January 14, 1925 (R. 9), and allowed on January 19, 1925 (R. 10), under Section 242 of the Judicial Code, before the Act of February 13, 1925. (chap. 229, 43 Stat. 936.)

THE QUESTION

The principal question presented is whether appellant, by filing and publishing a party tariff available to the public generally and requiring the payment of cash in advance for the transportation of passengers traveling in a party, and stating therein that it is not subject to land-grant deduction, can thus nullify the land-grant statutes applying to the transportation of troops of the United States.

STATEMENT OF FACTS

The appellant in the court below instituted suit to recover the sum of $25,609.00 (R. 3) and received judgment in the sum of $120.00 (R. 9).

The appellant is a Kentucky corporation owning and operating a system of railroads in several states, including Mississippi, Alabama, and Florida. Two of appellant's lines, one extending from Decatur, Alabama, to Pensacola, Florida, and the other from Pensacola to River Junction, Florida, were built with the aid of public land granted by Congress to the predecessor in title of the appellant. (R. 4.)

From August 10, 1911, to April 4, 1917, inclusive, the appellant transported, over its lines, upon authorized Government transportation requests, large numbers of officers and enlisted men of the United States Army and Navy. (R. 4.)

There were in force on appellant's lines at the time the transportation was furnished, individual

passenger rates for the public fixed by tariffs duly filed with the Interstate Commerce Commission as required by law. (R. 4.)

There was, in addition to such individual tariff rates, certain party rates open to the public in force on appellant's line at that time, by which ten or more passengers traveling by scheduled trains were entitled to reduced rates. Some of these party-rate tariffs provided that cash should be paid at the time the tickets were issued and that no land-grant should be deducted from such party rates. Other party tariffs provided neither for cash at the time the tickets were furnished nor against land-grant deductions. (R. 5.)

The appellant, as the initial carrier, presented its bills to the proper disbursing officers on Government forms. Where ten or more persons were transported in a troop movement, the appellant billed them at individual rates less land-grant deductions where the rates thus obtained were the lowest rates. Where such net rates were equal to or higher than party rates in force, party rates without land-grant deductions were used by appellant in computing its charges. When appellant's bills thus rendered came before the Accounting Officers for settlement, party rates with land-grant deductions were applied by said Accounting Officers. The appellant filed protests against the deductions from every one of the bills except Bill No. 2402. (R. 5.)

The land-grant deductions made from appellant's bills under party tariffs in force providing for payment of cash at the time the tickets were furnished and against land-grant deductions amounted to the aggregate sum of $23,399.26. The land-grant deductions made from appellant's bills under party tariffs in force, making no provision for payment of cash at the time the tickets were furnished nor against deductions for land grant, amounted to $441.44. (R. 5.)

Appellant rendered its Bill No. 2675 to the Army Disbursing Officer for the transportation of 1,988 United States Troops for special service charges, in addition to their per capita fares, between Hattiesburg and Camp Shelby, Mississippi. The court below found there was nothing in the evidence to show that special or expedited train service between Hattiesburg and Camp Shelby was requested by the Government. (R. 6.)

Appellant also rendered its bills, No. P–2701 and 2703, to the Disbursing Officer for $64.00 for the transportation of 460 United States troops for special service charges between Montgomery and Camp Sheridan, Alabama, in addition to their per capita fares. The court below found that there was nothing in the evidence to show that special or expedited train service between Montgomery and Camp Sheridan was requested by the Government. (R. 7.)

The court found that appellant was entitled to a judgment for $120.00 covering switching charges

on 24 cars of troops between Camp Sheridan and Montgomery, Alabama. (R. 6.) This item is not here disputed.

The court denied a recovery upon any of the other items, and appellant in its brief only discusses the action of the court in refusing to allow a recovery of the land-grant deduction from the party fares. The other questions appear to have been abandoned.

ARGUMENT

The only question argued by appellant in its brief in this case is whether these land-grant deductions are proper. Appellant contends that they are not proper. It urges that the courts have decided that the Government is not entitled to party rates; and, further, that party rates are net rates and are not subject to land-grant deductions. Appellant then insists that by the filing of the tariff providing that the rates therein specified should be paid in advance and should not be subject to land-grant deductions appellant relieved itself of the obligation to carry Government troops and property at land-grant rates, and therefore can deprive the Government of the benefit of such reduced rates.

In appellant's contention that the Government is not entitled to the benefit of a party rate it relies upon the case of *United States* v. *Chicago and Northwestern Railway Company,* 127 Fed. 785, decided by the Circuit Court of Appeals of the Seventh Circuit in 1904. It is hardly necessary to

discuss this case further than to point out that all that such case decided was that the refusal to give the Government the benefit of party rates upon the transportation of soldiers was not a discrimination against the Government, and did not subject it to any undue prejudice or disadvantage in violation of the then existing interstate commerce laws. The case was decided under the specific facts and the specific tariff therein involved, giving reduced rates to theatrical and athletic parties, etc., organized for specific purposes and granted for certain definite reasons. The tickets so issued were limited in their time and were required to be paid for in advance, none of which conditions attached to the transportation of soldiers. The court held that it was not an unjust discrimination or undue prejudice or disadvantage to the Government to be denied this rate, as the Government was not in any way in competition with such theatrical and athletic parties. The soldiers tickets were not limited in time and were not paid for in advance. The case in no way involved any question as to railroads who were under obligations by virtue of land grants made to them to carry troops of the United States at the lowest rate open to the public.

The appellant is a corporation, and part of its lines were aided by grants made by Congress. The Act of May 17, 1856 (Chap. 31, 11 Stat. 15, 16), and the Act of June 3, 1856 (Chap. 41, 11 Stat. 17, 18), granted lands in aid of the construction of

these lines and, in Section 3 of each of said Acts, it was specifically provided that:

> The said railroads and branch shall be and remain public highways for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

By virtue of the appropriation acts for the years in which these transportation services here in question were performed, the appellant was required to transport Government troops at a rate of not to exceed fifty per cent of the lawful rate open to the public for similar and like services. (See the following appropriation acts:)

> Act of March 23, 1910 (Chap. 115, 36 Stat. 243, 256–257).
>
> Act of March 3, 1911 (Chap. 209, 36 Stat. 1037, 1050–1051).
>
> Act of Aug. 24, 1912 (Chap. 391, 37 Stat. 569, 582–583).
>
> Act of Mar. 2, 1913 (Chap. 93, 37 Stat. 704, 715–716).
>
> Act of April 27, 1914 (Chap. 72, 38 Stat. 351, 364, 365).
>
> Act of Mar. 4, 1915 (Chap. 143, 38 Stat. 1062, 1076–1077).
>
> Act of Aug. 29, 1916 (Chap. 418, 39 Stat. 619, 633, 634).
>
> Act of May 12, 1917 (Chap. 12, 40 Stat. 40, 53, 54).

A typical act is the appropriation act for the fiscal year 1911, said appropriation act being the

Act of March 23, 1910, (Chap. 115, 36 Stat. 243, 256). After appropriating for the transportation of the Army and its supplies, it provided that such appropriation might be used—

> for the payment of army transportation lawfully due such land-grant railroads as have not received aid in government bonds (to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant acts), but in no case shall more than fifty per centum of full amount of service be paid: Provided, That such compensation shall be computed upon the basis of the tariff or lower special rates for like transportation performed for the public at large, and shall be accepted as in full for all demands for such service: Provided further, That in expending the money appropriated by this Act a railroad company which has not received aid in bonds of the United States, and which obtained a grant of public land to aid in the construction of its railroad on condition that such railroad should be a post route and military road, subject to the use of the United States for postal, military, naval, and other government services, and also subject to such regulations as Congress may impose restricting the charge for such government transportation, having claims against the United States for transportation of troops and munitions of war and military supplies and property over such aided railroads, shall be paid out of the moneys appropriated by the foregoing provision only on

> the basis of such rate for the transportation of such troops and munitions of war and military supplies and property as the Secretary of War shall deem just and reasonable under the foregoing provision, such rate not to exceed fifty per centum of the compensation for such government transportation as shall at that time be charged to and paid by private parties to any such company for like and similar transportation; and the amount so fixed to be paid shall be accepted as in full for all demands for such service; * * *.

In other words the statutes provided that such transportation should be performed for the Government at fifty per cent of the charge made for such railroad companies to the public for similar services, and that such amounts should be accepted as in full for all demands for such services.

Prior to the time of the service here in question the appellant had filed with the Interstate Commerce Commission tariffs which were open to the public and which fixed the individual passenger rates for the public, and had also filed other tariffs open to the public providing that where ten or more persons were in a party traveling on scheduled trains they were entitled to reduced rates. Some of these party rates provided that these rates should be paid at the time the tickets were issued and that there should be no land-grant deductions made from such party rates. Others provided neither for cash at the time the tickets were furnished nor

against the land-grant deductions from such party rates. The appellant transported large numbers of officers and enlisted men of the Army. In some instances there was a single passenger; in others there was more than one but less than ten; and in others there were many more than ten. The appellant rendered its bills as follows: Where ten or more persons were transported in one movement they were billed at individual rates less land-grant deductions unless this exceeded the party rate without land-grant deductions; but if such net rates were equal to or higher than the party rates, then the appellant billed at the party rates without land-grant deductions. The accounting officers of the Government settled the bills upon the basis of party rates less land-grant deductions, and to this the appellant protested except as to one bill. The amount of such deductions made by the Government was $23,399.26 in cases where the tariff required payment in cash in advance. The amount deducted in cases where no such requirement was made in the tariff was $441.44. There is one item upon which there was a deduction of $1,789.36, to which appellant did not protest, and this amount is included in said sum of $23,399.26. (R. 6.)

By virtue of the land grant statutes the Government aided the construction of these lines of railroad by the giving of land; and in return, by accepting such land, the railroad company agreed that the Government should be entitled to the carriage of its troops without charge. Congress in

the appropriation acts authorized the payment to such roads of a sum not to exceed fifty per cent of the charges made by the railroad company to the public for like and similar transportation services. This arrangement has a double claim of binding effect upon the appellant, First, as a contract, and Secondly, as a statute of the United States. The court has found that these party rates are open to the public, and it is difficult to understand why, in view of the land-grant and appropriation statutes, not only this party rate but also this party rate with land-grant deductions is not open to the United States. In fact appellant in rendering bills at party rates, when these were lower than individual rates less land-grant deductions, conceded that the Government was at least entitled to party fares even though the Government had not paid cash in advance. The whole theory of the land grant laws is to the effect that the Government shall receive a reduced rate from any rate open to the public; and if it is once shown, as the court has found in this case, that such rate is open to the public, the Government is certainly entitled to the same under such land-grant laws and appropriation acts unless there is some specific reason which brings about a different result.

The appellant contends that this reason is furnished by the provision of the tariff that the party rates therein fixed should be paid in advance or at the time of the issue of the tickets, and that the same should be without land-grant deductions.

They intimate that unless the Government was required to observe these conditions it would be an unjust discrimination in favor of the Government. However, this Court has held that the principal object of the Interstate Commerce Act was to secure just and reasonable charges, prohibit unjust discrimination, and prevent undue and unreasonable preferences. (*I. C. C.* v. *B. & O. R. R. Co.*, 145 U. S. 263, 276.)

A careful examination of the acts of Congress dealing with this subject shows that the Government is expressly excepted from all provisions relating to the relations between common carriers and private shippers. Section 22 of the original Interstate Commerce Act, approved February 4, 1887 (Chap. 104, 24 Stat. 379, 387), provided "that nothing in this act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States." The same exception appeared in Section 22 of the Act of March 2, 1889 (Chap. 382, 25 Stat. 855, 862), and in all of the subsequent amendments to the Interstate Commerce Acts this exception in favor of the Government has not been disturbed. It might be pertinent to here observe that, while passed after the transactions here in question, similar and enlarged provisions in this respect appear in Section 3 of the Transportation Act of 1920 (Chap. 91, 41 Stat. 456, 479). Clearly, therefore, the giving to the United States of a reduced rate or even the failure to require the payment of cash in advance which

was enforced as to all other shippers is not a discrimination or a violation of the Interstate Commerce Acts.

In substance the appellant is seeking to avoid its obligations and its agreement granted by the statutes and by its acceptance of this land aid by filing with the Interstate Commerce Commission a rate which provided that cash should be paid at the time of the issue of the tickets and that the rate specified therein should be without land-grant deductions. If in this way the railroad could be relieved of its obligations and the effect of these statutes, there is no reason why it could not be so relieved as to every item of Government transportation by the mere filing of a tariff or schedule covering the same, either providing for the payment in advance in cash, or that the rate should be without land-grant deductions. The railroad would be thus enabled to break its contract, and the Government would thus be deprived of the consideration which it expected to receive and which appellant agreed to give because of the granting of these lands; which lands the appellant has accepted and used, and from which it has benefited. The law will not permit such as this to be done.

In the operation of the Government under the existing laws, the rules and regulations of which the railroad well knew, and under which the Government, with the knowledge of the railroads, has operated for many years past, it is a physical impossibility to pay for Government transportation

at the time of the issuing of the ticket. There is no way by which the Government does or can advance money to its officers to pay in cash at the time of the issuing of their tickets. The laws, the rules, and the regulations contemplate that for Government services bills shall be rendered, and they shall have the proper consideration by several Government officials before they are paid. They must be approved and checked and warrants drawn in payment thereof. Where land-grant routes are involved there is hardly a station agent who could figure a rate based thereon. There are few, if any, Government officials who know what railroads are land-grant railroads. Often the grants were made to certain corporations, and by virtue of consolidations, mergers, and other proceedings these land-grant roads have now passed into the hands of companies of entirely different names from those to whom the grants were originally issued, so that if we even indulge in the presumption that the officers of the Government are charged with notice of the land grants as contained in the statutes, still there is no practical way by which they could obtain this other information. Therefore the condition imposed of the payment of cash at the time of the issuing of the tickets, so far as the Government is concerned, is a condition impossible of performance and a condition that is contrary to all laws, rules, and regulations concerning the payment of Government bills. The condition is contrary to the course of dealings

which had been going on between the railroads and the Government for many years past. Further than this, the railroad waived the condition in this case.

From the great mass of cases considered by this Court, and from the departmental rules, regulations, and statutes concerning the same, this Court will take judicial notice of the fact that for many years past it had been the custom of the Government and of the railroads in their course of dealings not to require cash in advance. The Government transportation requests (because of the great number used) were upon printed forms presented to the railroad companies, and upon this the necessary tickets and transportation were given. Under these circumstances the Government was entitled to assume that these transportation requests upon which the Government would be billed, were accepted in lieu of cash just as the railroads had done for many years past. There is nothing in this record showing any request by the railroad company for payment in advance, and by accepting the transportation request, and furnishing the services so requested, the railroad company in view of the long-established custom waived the requirement of the tariff that cash must be paid in advance. The appellant even billed part of such services at party rates, even though no cash had been paid in advance. It can therefore not now be heard to complain, as it was entirely within its power to

waive such requirement as to the Government. To do so was no unlawful discrimination or concession.

It might also be pointed out that the statutes requiring the railroads to transport at fifty per cent of the rate charged to the public provided that it should be fifty per cent of a rate charged to the public for *like and similar transportation.* If the public could procure certain transportation services at a given rate, under the law and the agreement the Government could procure like and similar transportation services at fifty per cent of such rate. The time of the payment for such services was not any part of the conditions of the Government's right to the deductions. If the *transportation* service which it desired was *like and similar* to that which the public might procure at a certain rate, the right of the Government to the deduction was absolute, regardless of when it paid for the same. The time of payment is not a part of the *service.* The statute only requires that the transportation service (not the time of payment) must be like and similar to that given the public under the tariff.

The only effect of the provisions of the tariff which stated that the rate therein fixed should be without land-grant deductions would be a direct attempt to remove the obligations upon the appellant created by its agreement and by the statutes. Land-grant provisions are not applicable to the public generally, and therefore a provision attempting to do away with land-grant deductions can have

no application to the public. It can apply only to the Government and to Government transportation. This was therefore a direct attempt to do away with the obligations of the railroad to the Government in this respect. It was not a condition applicable to the public, because it could have no such application, and for this reason, as well as the others above discussed, under even a strict interpretation of the statutes, it could have no application to the Government. For the reasons heretofore discussed, it is believed that such a condition is illegal and void and of no effect whatsoever.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that the judgment of the Court of Claims is proper and should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

NOVEMBER, 1926.

SUPREME COURT OF THE UNITED STATES.

No. 61.—October Term, 1926.

The Louisville & Nashville Railroad Company, Appellant, *vs.* The United States.	Appeal from the Court of Claims.

[February 21, 1927.]

Mr. Justice Sutherland delivered the opinion of the Court.

Appellant owns and operates a system of railroads among which are two land-grant aided lines. During the period from 1911 to 1917 there were transported for the Government over these lines upon transportation requests large numbers of officers and enlisted men of the United States army and navy. Individual passenger rates to the public during that time were in force, and in addition certain party rates open to the public by which ten or more passengers were entitled to reduced rates. Some of the rate tariffs provided for cash payments when tickets were issued and that there should be no land-grant deductions made from such party rates. In other tariffs no such provisions were made. As initial carrier, appellant presented its bills on proper forms to the disbursing officers of the Government. In some of the bills individual rates with land-grant deductions were charged where ten or more persons had been transported in troop movement; and in others party rates without land-grant deductions were charged, depending upon which was the lower rate. The accounting officers of the Government in all these cases applied party rates with land-grant deductions. To these rulings appellant filed protests, and this suit to recover the amounts involved followed. The court below denied appellant's right of recovery. 59 C. Cls. 886.

Appellant's contentions are (1) that the Government in transporting troops has no right to avail itself of party rates but that these are restricted to passengers traveling on private account and

(2) that if the Government avail itself of the party rates it must pay cash in advance in accordance with the tariff provisions.

It is not disputed that in virtue of valid acts of Congress (for example, see c. 115, 36 Stat. 243, 256) appellant's land-grant aided lines were bound to carry officers and men of the army and navy at a rate, in the words of the law, "not to exceed fifty per centum of the compensation for such government transportation as shall at that time be charged to and paid by private parties to any such company for like and similar transportation" and that such amounts must "be accepted as in full for all demands for such service." That the party rates, being open to private parties, were open to the Government with a deduction of 50% under this express provision of the statute, does not admit of doubt.

Nor is there any merit in the contention that the Government may avail itself of the rate only by paying cash in advance. Appellant issued the tickets and sent in its bills therefor without asking for cash payments. It thereby waived the requirement, if any existed, for payment in cash. Moreover, as the court below pointed out, the Government from the very nature of things cannot be required to deal for transportation on a cash basis. It is not to be supposed that station agents generally are familiar with the land-grant legislation or the limits of the various land-grant lines so as to be able readily to make the necessary computations. But, in any event, the well settled practice of the Government is to issue requisitions for transportation, and to require the rendition of bills therefor to be examined and audited by its accounting officers. This method was recognized and accepted by appellant in the present case. See *Louisville & Nashville R. R. Co.* v. *United States,* 58 C. Cls. 622, 631.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.